Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 75-651, 75-715, and 75,718
(Consolidated)

No. 75-651
TEAMSTERS LOCAL UNION 657, *Petitioner*
v.
JESSE RODRIGUEZ, ET AL., *Respondents*

No. 75-715
SOUTHERN CONFERENCE OF TEAMSTERS, *Petitioners*
v.
JESSE RODRIGUEZ, ET AL., *Respondents*

No. 75-718
EAST TEXAS MOTOR FREIGHT SYSTEM, INC., *Petitioner*
v.
JESSE RODRIGUEZ, ET AL., *Respondents*

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER SOUTHERN CONFERENCE OF TEAMSTERS

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January, 1977

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REPLY BRIEF FOR PETITIONER SOUTHERN CONFERENCE OF TEAMSTERS

At the date of this writing, the Mexican American Legal Defense and Educational Fund (MALDEF) as attorney for Respondents,[1] and the NAACP Legal

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[1] A brief has also been filed on behalf of Ernest Herrera, Trini Uribi, Mario Melchor, Patrick Resendis, Tony Escobedo and Elias Gonzalez. That brief raises no arguments beyond those contained in MALDEF's brief and we therefore address our response solely to the MALDEF brief.

Defense and Educational Fund, Inc. (NAACP), as *amicus curiae,* have filed briefs in response to that filed by petitioner Southern Conference in the above consolidated cases. A memorandum by the Justice Department and Equal Employment Opportunity Commission (the Government), as *amicus curiae,* has also been received and apparently filed. Petitioner Southern Conference addresses the arguments raised by MALDEF, NAACP and the Government as follows:

I.

The Seniority System and Union Petitioners Do Not Violate Title VII.

MALDEF's position on the merits of the substantive issues presented is, of course, largely refuted by the failure of the Government or the NAACP to support it. (See discussion, *infra.*) Moreover, MALDEF's brief simply does not address the considerations which dictate a finding that the contract seniority system and union petitioners have not violated Title VII.

In its original brief herein, Petitioner Southern Conference noted that no seniority system can automatically grant seniority to individuals whom an *employer excludes* from the bargaining unit in which the system operates. Here, the allegation is that ETMF, by virtue of hire and transfer policies, discriminatorily excluded minorities from the road bargaining unit. Those employer wrongs are the sole cause of any detriment the Respondents have suffered. The seniority system never applied to them and never constituted an operative barrier to their entry into the road unit. The only such barrier was the employer's hiring and transfer policies. As in *Franks* v. *Bowman*

Transportation Co., 424 U.S. 747, "the underlying legal wrong * * * is not the alleged operation of a racially discriminatory seniority system, but of [an alleged] racially discriminatory hiring [and transfer] system." *Franks, supra* at 758. And, as in *Franks,* Respondents do not seek as seniority relief "dismantlement or fundamental change of the seniority system, or even the merger of separate rosters into a single list," (MALDEF Brief, p. 85.) Further, as *Franks* holds, the actual victims of hiring and transfer discrimination are by virtue of § 706(g), the Act's remedy provision, entitled to "their rightful place in the hierarchy of seniority." *Id.* at 768; see also 762-70. Thus, the system cannot constitute even a secondary obstacle to Respondents' enjoyment of equal employment opportunity.

The seniority system at issue simply grants job seniority after entry into the particular (road, city, garage or office) bargaining unit. It is entirely distinct and independent from hiring and transfer policies which the employer unilaterally controls. The seniority system is neutral on its face and in its origin,[2] is preferred by affected employees, and has not been used or applied to deny minority "victims" their

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[2] MALDEF asserts at p. 74 of its brief that "the purpose and effect of petitioners' no-transfer rules and dual seniority system were to prevent minority city drivers from obtaining road positions." The record references which follow (A.155, 174, 233) demonstrate no such purpose in regard to "minority city drivers." In fact, MALDEF thereafter tacitly admits that the seniority system *is* neutral (non-discriminatory) in its origin.

See MALDEF Brief at pp. 89-90. And, of course, these seniority rules apply equally to *all* employees, regardless of race or national origin.

"rightful place."[3] The contracts at issue here both prohibit discrimination and provide a grievance and arbitration procedure as a mechanism by which discriminatees may achieve their "rightful place". Under these circumstances, no Title VII violation has occurred. (See Southern Conference Brief, pp. 23-36.)

MALDEF's response, boiled down, is to reurge the rote, unreasoning argument employed by the court below: arguing that ETMF has allegedly discriminated in the filling of road jobs, MALDEF says that because the subject contracts do not automatically effect a grant of road seniority to minority city employees, the contract seniority system and union petitioners violated Title VII. (See MALDEF Brief, pp. 80-109.) MALDEF thus seeks to confuse this court's holding in *Franks*—that a lawful, *bona fide* seniority system does not bar the award of seniority relief to Title VII discriminatees—with the inconsistent proposition that a seniority system which does not automatically give seniority to discriminatees cannot be *bona fide* and violates Title VII. We repeat: *No* seniority system can automatically grant seniority to those an employer

[3] At p. 101 of its brief, MALDEF states that "Teamsters Unions" have taken "positions of uncompromising opposition to any relief for any minority city drivers . . . ." Again, this statement is not supported by any record reference. Clearly, what MALDEF *really* complains about is the suggestion that minority city drivers should be required to show that they were discriminatorily denied road employment, as a prerequisite to the award of "rightful place" road seniority. This suggestion, by Southern Conference or any other entity, is entirely appropriate. As demonstrated *infra*, fn. 10, it cannot be assumed that all minority city drivers have discriminatorily been denied road jobs, and union entities have an obligation to protect incumbent road drivers from reverse discrimination. See Southern Conference Brief at pp. 31, 34-35 and cases cited therein.

excludes from the bargaining unit the particular system covers. This Court recognized as much in *Franks, supra.* (See Southern Conference Brief, at pp. 26-27.) The logical result of MALDEF's unreasoned argument is to make unlawful *any* seniority system in the context of discriminatory hiring and transfer practices by an employer. As we have demonstrated before, that is plainly not the intent of Title VII.[4]

MALDEF fails to acknowledge, or even to discuss, the obvious distinctions between the seniority system at bar and those others which have been the basis for a finding of Title VII violation. Compare MALDEF Brief at pp. 85-92 and Southern Conference Brief at pp. 27-30. Respondents seek, in effect, to make union petitioners responsible both for ETMF's unilaterally administered hiring[5] and transfer practices,[6] and for the failure of alleged discriminatees to seek redress through contract mechanisms, or otherwise even to complain about the contract seniority system.[7] Such

[4] See Southern Conference Brief, pp. 25-27.

[5] At p. 96 of its brief, MALDEF implies that Local 657 discriminated against minority individuals as "a referral source for applicants." As usual, there is no record reference. In fact, there is not a shred of evidence of either discrimination or referral of road applicants by any union entity.

[6] Contrary to MALDEF's assertions (see MALDEF Brief, pp. 94-96, 100) Southern Conference has directed local unions to urge ETMF and other employers to permit city employees to fill road vacancies on a preferential basis over off-the-street hires. (A. 214).

[7] At pp. 107-08 of its brief, MALDEF suggests that utilization of contract procedures or complaint about discrimination would have been futile. No record cite is made, and there is no record evidence to support such an allegation.

Nor does Southern Conference contend that a Title VII Claim is barred by failure to exhaust contract procedures. (See MAL

an approach has no support in the record here, nor in legal authority. For all the reasons stated in Southern Conference's original brief, this Court must conclude that as to the seniority system and union petitioners, no Title VII violation has occurred.

II.

This Court Has Not Improvidently Granted the Writs Herein.

NAACP contends that certiorari was improvidently granted because the Fifth Circuit's decision herein is allegedly supported by the record and partially mooted by relief [8] accorded in another case, now pending in the Fifth Circuit, *United States* v. *East Texas Freight System, Inc.* (No. 75-3332, appeal pending, United States Court of Appeals for the Fifth Circuit).[9] Thus, NAACP at once refuses to address the substantive issues presented by union petitioners, and instead seeks to place before this Court the record in another case, not yet decided below.

DEF Brief, pp. 108-09). We simply argue that, where alleged discriminatees neither complain nor seek to use contract grievance procedures to obtain their "rightful place," no Title VII violation has occurred.

[8] At page 3 of its brief, NAACP writes:

> The evidence which petitioners assert is required to support the decision below, which they object as absent from the record in this case, is to a substantial degree present and uncontested in *U.S.* v. *ETMF*. As to certain issues and class members, the instant case has been rendered partially moot by *U.S.* v. *ETMF*.

[9] NAACP also contends the petitions of Southern Conference and Teamsters Local Union 657 purportedly present questions "interlocutory in nature" (NAACP Brief, pp. 2-3, 16-18). This contention is addressed at fn. 14, *infra*.

As ETMF points out in its Reply Brief at pp. 18-19, NAACP's attempt to inject extra-record "evidence" into this case is wholly improper. Moreover, by a combination of innuendo [10] and omission, NAACP implies that the record in *U.S.* v. *ETMF, supra,* (selected parts are filed with this Court as an exhibit [EA]) would support a conclusion that the seniority system here at issue violates Title VII, and that Southern Conference (and Local 657) should be held liable there-

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[10] At page 12 of its brief, NAACP argues with Southern Conference's statement (Southern Conference Brief, p. 8) that the racial and national origin make-up of city *employees* at ETMF's Texas terminals *generally* reflects the racial-national origin make-up of the communities in which the terminals are located. (Emphasis added). See also, MALDEF Brief at pp. 5-9.

NAACP complains that at some terminals there are no minority city drivers, and that there is a disproportionately large percentage of minority drivers at others. NAACP disregards the fact that Southern Conference's reference was to city *employees*, rather than simply to city drivers (see Southern Conference Brief, pp. 5-8) and that various minority city employees, at various locations, used their seniority to claim non-driving city jobs (A. 369-73, 379). Moreover, the overall percentage of ETMF minority city drivers reflected in the Appendix to NAACP's Brief (35%) *does* resemble the minority population at the terminals involved. But even that is not the point.

The statistics set out in the Appendix to NAACP's Brief show that substantial numbers of "non-minority," anglo employees populate city jobs. If substantial numbers of anglos either (a) desire city work or (b) could not obtain road work, logically the same must be true of minority employees. This is *not* to say that some minority city employees have not been discriminatorily denied road jobs. It *is* to say that *it cannot be assumed that all minority city employees have been discriminatorily denied road employment.* That is precisely the assumption that underlies, and infects the reasoning of the Fifth Circuit and Respondents' argument upon the merits of the case. (See discussion at Southern Conference Brief pp. 30-36).

for.[11] In fact, cited testimony in NAACP's Exhibit will not support such a conclusion.[12]

Equally misleading is NAACP's implication that the trial court in *U.S.* v. *ETMF* concluded that the subject seniority system violated Title VII, and that the union entity involved (International Brotherhood of Teamsters) was liable for back pay as a result. See NAACP Brief, p. 6. To the contrary, it was *not* specifically held that the seniority system violated Title

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[11] At footnote 54 of its brief (pp. 16-17) NAACP states:

> The Conference also objects to monetary liability on the ground that the Teamsters actively support placing minority victims of discrimination in their "rightful place." Conference Brief, pp. 33-34. The record in this case reveals not a single instance in which union officials took action to prevent or remedy ETMF's flagrant policy of discrimination; *the record in U.S.* v. *ETMF, reveals a refusal to do so.* EA 87-88, 113-119. (Emphasis added).

[12] The record reference is to three conversations minority employees had with obscure representatives of local unions not involved in the instant case. Nothing there relates to conversations with representatives of Southern Conference or Local 657. The conversations reflect no claim that individuals there seeking road employment had previously been discriminated against in the assignment of road jobs. Rather, those individuals simply express a desire to bump incumbent road drivers from their jobs, *without a showing of discrimination.* The Fifth Circuit itself has acknowledged that, absent initial discrimination, minority employees are not "victims," and have no "rightful place." See *Rodriguez* v. *East Texas Motor Freight, Inc.*, 505 F.2d 40, 61-64 (5th Cir., 1974, cert. granted, Nos. 75-651, 75-715 and 75-718). And see *Franks* v. *Bowman Transportation Co.*, 424 U.S. *747*, 47 L.Ed. 2d 444 at 468, 471, 473-78 (1976). NAACP's suggestion that the record in *U.S.* v. *ETMF* supports a finding that Southern Conference or Local 657 has opposed the award of "rightful place" seniority to "minority victims" is absolutely inaccurate.

VII, and the employer alone was held liable for back pay.[13]

In sum, NAACP's consistent reference to the record in another case reduces, at bottom, to no more than a dissatisfaction with the record in the instant case; its consequent failure to address the substantive issues raised by union petitions herein is tantamount to a confession to the merit of union petitioners' arguments.[14]

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[13] A reading of the trial court's Order dated May 28, 1975 (see NAACP Exhibit, pp. 292-95) reflects no finding of Union Title VII violation. And missing from the NAACP's Exhibit is a June 26, 1975 Order wherein the trial court held:

> With respect to back pay, the undisputed facts of this case identify the employer (ETMF) as principally responsible for the discrimination against the affected class. By the consent decree back pay to the affected class was taxed against the employer, the party principally responsible for the discrimination in hire, and in prohibiting transfer. In these circumstances final responsibility for the monetary recovery is properly attributable to the employer, and not to defendant union. See *Guerra* v. *Manchester Terminal Corp.*, 498 F.2d 641 at 656 (C.A. 5, 1974). (The entire January 26 Order is reproduced in the Appendix attached to this Reply Brief, at pp. 1a-3a).

NAACP states, at fn. 19 of its Brief, that "the liability of the International to the seventy-nine (79) covered employees is the subject of a pending appeal in *U.S.* v. *ETMF.*" It fails to state that the Government is the appellant on that issue.

[14] Citing *Brotherhood of Locomotive Firemen* v. *Bangor Aroostook R.R.*, 389 U.S. 327 (1927), NAACP also argues that Southern Conference's writ should be dismissed because the Fifth Circuit has remanded the case to the trial court to "apportion some part of the total back pay liability to (Southern Conference and Local 657)." Of course, the Fifth Circuit has rendered a judgment herein (A. 68-111). That is the only jurisdictional prerequisite to this Court's review by writ of certiorari. 28 U.S.C. Sec. 1254(1). No party to this action suggests that the instant case is not ripe

III.

The Court Should Render Decision on the Issues Presented by Union Petitioners.

Likewise, the Government tacitly confesses that union petitioners' arguments are meritorious. Simultaneously, it seeks remand of this case for new trial, hoping there to adduce additional evidence, sufficient to convict the contract seniority system, Southern Conference and Local 657 of Title VII violation and liability.

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for review. And the authority tardily advanced by NAACP as basis for withdrawing the grant of the petitions herein is not on point.

In *Brotherhood of Locomative Firemen* v. *Bangor Aroostook R.R. Co., supra,* the Court of Appeals had "remanded to the District Court to consider whether there had in fact been a contempt, and, also, if there was a contempt, whether it was 'of such magnitude as to warrant retention, in part or to any extent, of the coercive fine originally provided for in contemplation of an outright refusal to obey'." 389 U.S. at 328. Since the Court of Appeals did nothing more than construct a legal framework in which the issue of contempt was to be tried, the case was not yet ripe for review by the Supreme Court, *Ibid.* Circumstances in the instant case are altogether different.

Here, the trial court found that East Texas Motor Freight, Southern Conference, Local 657 and the subject seniority system did not violate Title VII, and dismissed Respondents' claims. Rather than constructing a legal framework in which issues of Title VII violation and liability should subsequently be retried, the Fifth Circuit *reversed*, held upon the record presented that the subject seniority system violated Title VII, and that East Texas Motor Freight, Southern Conference and Local 657 were liable to plaintiffs as a result. The remand to the trial court was solely to apportion back pay liability among East Texas, Southern Conference and Local 657. Further trial as to the issues of Title VII violation and liability was foreclosed. As to those issues, now before this Court by virtue of union petitions herein, the judgment of the Court of Appeals was final in all respects.

Writes the Government at pp. 16-17 of its Memorandum:

> *The state of the record . . . makes this case inadequate for consideration by this court of important questions of liability and remedies in Title VII litigation . . . We therefore believe that the Court should not reach important substantive questions of Title VII enforcement in a context provided by the record in this case.* (Emphasis added)[15]

The Government openly admits that the record here will not support a finding that the subject seniority system and Union Petitioners have violated Title VII! It was not always so.

In this very case, as *amicus* in the Fifth Circuit, the Government sought flat reversal of the trial court's finding that the subject seniority system and Union Petitioners did not violate Title VII. In its brief to the Fifth Circuit,[16] it stoutly contended that record evidence was fully sufficient to warrant a finding that the contract seniority system and Union Petitioners violated Title VII "as a matter of law." The Government's brief argued that:

> "the statistical evidence introduced . . . establishes beyond question an ongoing pattern of race discrimination by the hiring of over-the-road drivers throughout the State of Texas . . . The motivation of the defendants in implementing the seniority rule need not be studied . . . the contractually

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[15] The government then suggests remand to the trial court for further processing as a class action, so that the trial court can examine "all of the evidence relevant to ETMF's employment practices and petitioners' defenses . . . ." (EEOC Memorandum, p. 17.

[16] The government's Brief in Rodriquez v. East Texas Motor Freight, et al, 505 F.2d 40 (5th Cir. 1975) is filed herewith as Southern Conference Exhibit A.

> mandated loss of seniority would place an impermissible burden upon the victims of East Texas' past discrimination. Absent some compelling business necessity, defendants' seniority . . . policies are violative of Title VII . . . justifications offered by the company and the union are insufficient to justify (such) an unlawful policy." Southern Conference Exhibit A, pp. 9, 14, 15, 16.

In conclusion, the Government's Fifth Circuit brief prayed that the appellate court "*reverse* the ruling below and remand this case for formulation of appropriate relief." (Emphasis added). (*Id.* at 27). Nowhere did the Government so much as hint that the case should be remanded for further trial as to liability. Nowhere did it acknowledge even the possibility of lack of evidence concerning liability.

Since the Fifth Circuit issued its decision herein, this case has continuously been cited by the Government as *controlling authority* for the proposition that the subject seniority system and various union bodies have violated Title VII and incurred liability as a result. See *Sagers* v. *Yellow Freight Systems, Inc., et al.*, — F.2d — (5th Cir. 1973); *United States* v. *East Texas Motor Freight, et al.* (No. 75-3332, appeal pending, United States Court of Appeals for the Fifth Circuit); and *United States* v. *Terminal Transport, et al.* (No. 16761, United States District Court for the Northern District of Georgia). For example, in *Sagers, supra* the Government states as follows:

> The Unions were properly held responsible for continuing the effects of past discrimination by their negotiations and interpretations of their collective bargaining agreements in a manner which required that blacks, who had been relegated to city driver positions, could transfer to road positions only with loss of company seniority. As the Court stated in Rodriquez, supra, 505 F.2d at p. 61:[14] (It is for the Unions') role in establishing separate seniority rosters that fail to make allowance for minority city drivers who had been discriminatorily relegated to city driver jobs (that the Unions) must be held accountable.

[14] Accord: Herrera v. Yellow Freight Systems, Inc., supra, 505 F.2d at p. 68; Resendis v. Leeway Motor Freight supra, 505 F.2d at p. 71; Bing v. Roadway Express, Inc., supra, 485 F.2d at p. 451.

Now, almost three (3) years after full participation at the Fifth Circuit level as *amicus,* the Government tells this Court that the record will not support the very proposition (concerning union Title VII violation and liability) upon which it has so often relied! It now suggests that retrial is necessary to support the Fifth Circuit's holding. A better (or worse) example of boot-strapping cannot be imagined!

Equally disturbing is the Government's contention that prejudice to "petitioners" requires retrial of this case. To this end, the Government cites as absent in the instant case, but present in *U.S.* v. *ETMF, supra,* various evidentiary elements which *relate solely to proof of alleged discrimination in hire by petitioner East Texas Motor Freight.* See Government Memorandum, pp. 16-17. Nowhere in the Government's Memorandum does it appear that Respondents, or the Government, or NAACP have been prejudiced in the trial of this case. Nowhere, in its Memorandum, does the Government contend that there exists in the record in *U.S.* v. *ETMF* evidentiary elements relating to *union* Title VII violation or liability.

It is enough now to say that the federal agency charged with enforcement of Title VII cannot, upon

this or any other record, justify a finding of union Title VII violation and liability. This Court's inevitable holding to that effect should not be delayed so that Respondents, or the Government, or NAACP, can blindly cast about in an attempt to make a record which would justify a different result. This Court should proceed forthwith to decide the issues presented by union petitioners herein.

CONCLUSION

Respondents fail to show legal or evidentiary basis to support the Court of Appeals' departure from the District Court's findings and conclusions. For the reasons set forth here and in its original brief, Petitioner Southern Conference prays that the decision of the Court of Appeals be reversed and that of the District Court reinstated.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-60250B

UNITED STATES OF AMERICA, *Plaintiff*

v.

EAST TEXAS MOTOR FREIGHT INC., THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *Defendants*

(Filed June 26, 1975)

Order Denying Plaintiff's Motion To Amend Order of May 21, 1975

The Court having considered the Plaintiff's Motion to Amend this Court's Order entered on May 21, 1975, the plaintiff's memorandum brief in support of said Motion, and the response thereto filed by defendant International Brotherhood of Teamsters, notes that the plaintiff seeks amendment of the order 1) to hold defendant International Brotherhood of Teamsters liable for back-pay, 2) to delete the portion of the Order providing for submission to the grievance procedure, subject to court review, and 3) to permit carryover seniority to affected class members transferring beyond the job market in which each is employed.

Upon consideration of the motion papers above described, and the entire record, the Court finds:

1. With respect to back pay, the undisputed facts of this case identify the employer as principally responsible

for the discrimination against the affected class. By the consent decree back pay to the affected class was taxed against the employer, the party principally responsible for the discrimination in hire, and in prohibiting transfer. In these circumstances final responsibility for the monetary recovery is properly attributable to the employer, and not to defendant union. See *Guerra* v. *Manchester Terminal Corporation,* 498 F.2d 641 at 656 (C.A. 5, 1974).

2. There is no basis in this record for limiting the access of employees, union, or employers to the grievance and arbitration procedure by which disputes as to working conditions, including seniority standings have traditionally, and fairly been determined. Such determinations as to affected class seniority allocations remain subject to court review in accordance with the provisions of the May 21 Order.

3. Nor is there basis for alteration of the seniority carryover provisions of the prior order. The plaintiff erroneously contends that this Court's May 21, 1975 Order conflicts with the previously entered Consent Decree by which ETMF agreed that Affected Class members could transfer to the road "at the terminal at which he is employed (if that terminal has an over-the-road operation) or at a terminal within the job market, or to a terminal of his choice (if the terminal at which he is employed has no over-the-road operation) . . ."

There is no conflict. The May 25, 1975, Order does not limit the situs to which Affected Class members may transfer. It relates only to the seniority standing they will have upon transfer. Those who transfer city to road at their home terminal, or within the job market area surrounding their home terminal, "wherein they might reasonably have been expected to seek and obtain road employment" will take with them seniority from the date of qualification for road employment.

Those who opt to move across the nation may still do so under the prior Consent Decree. But they may not take their prior seniority with them.

No white has ever had the option to carry seniority city or road in such a manner. There is no evidence in this record that any ETMF city driver at a non-road terminal might reasonably have been expected to seek and obtain road employment at a terminal outside the surrounding job market area.

To grant the plaintiff's request would be to place the discriminatees in better positions than they could have achieved without discrimination. This the Court may not do. cf. *Bing* v. *Roadway Express,* 485 F.2d 441 at 449 (5th Cir. 1973) and *Rodriguez* v. *East Texas Motor Freight,* 505 F.2d 40 at 63-64.

It is accordingly Ordered that the plaintiff's Motion to Amend this Court's Order entered on May 21, 1975, be, and it hereby is Denied.

Signed and Entered this 26 day of June, 1975.

/s/ Sarah T. Hughes
Sarah T. Hughes
United States District Judge

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